# Public Prosecutor v Yiau Swee Tung

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 41–4 OF 1998
TEE AH SING J
6 OCTOBER 1998

***Evidence*** *— Expert evidence — Gaming — Expert to state his reasons and evidence to be tested — Testimony that papers seized from accused relate to an illegal 4-D lottery — No reason or explanation for opinion given — Whether evidence adequate*

The respondent was charged under s 4A(a) of the Common Gaming Houses Act 1953 for carrying out illegal 4-D lottery. He was arrested and several pieces of paper containing some numbers ('the seized papers') with some cash were seized from his left trousers pocket. At the trial in the magistrate's court, a gaming expert testified that the seized papers relate to an illegal 4-D lottery. The respondent was acquitted and discharged at the close of prosecution's case. The appellant appealed.

**Held**, dismissing the appeal:

The expert evidence given by the gaming expert was inadequate to enable the court to form an independent judgment that the seized papers relate to an illegal 4-D lottery as no reason or explanation was given as to how the opinion was arrived at. As such, the prosecution failed to prove beyond reasonable doubt that the seized papers were documents of 'any account, memorandum, riddle or record of stakes or wagers in relating to a lottery' (see p 356I–357A).

**[Bahasa Malaysia summary**

Responden dituduh di bawah s 4A(a) Akta Rumah Judi Terbuka 1953 kerana menjalankan loteri 4-D haram. Beliau ditangkap dan beberapa kepingan kertas yang mengandungi beberapa nombor-nombor ('kertas-kertas yang dirampas tersebut') bersama dengan sedikit wang tunai telah dirampas daripada saku kiri seluar beliau. Semasa perbicaraan di mahkamah majistret, pakar judi memberikan keterangan bahawa kertas-kertas yang dirampas tersebut adalah berkaitan dengan suatu loteri 4-D haram. Responden telah dibebaskan dan dilepaskan pada penutup kes pendakwaan. Perayu merayu.

**Diputuskan**, menolak rayuan:

Keterangan pakar yang diberikan oleh pakar judi adalah tidak mencukupi untuk membolehkan mahkamah untuk membuat suatu penghakiman yang bebas bahawa kertas-kertas yang dirampas tersebut berkaitan dengan suatu loteri 4-D haram memandangkan tiada alasan atau penjelasan diberikan tentang bagaimana pendapat tersebut dicapai. Maka demikian, pihak pendakwaan gagal untuk membuktikan sehinggga tiada keraguan munasabah bahawa

kertas-kertas yang dirampas tersebut ialah dokumen-dokumen 'apa-apa akaun, memorandum, tanda tanya atau rekod perjudian atau pertaruhan berkaitan dengan suatu loteri' (lihat ms 356I–357A).] A

**Notes**

For cases on gaming evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 924–929. B

**Cases referred to**

*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 (refd) C
*PP v Chee Kon Fatt* [1991] 3 CLJ 2564 (refd)
*PP v Por Chong Beng* [1996] 4 MLJ 467 (refd)
*Wong Wiew Hock v PP* [1997] 3 CLJ 255 (refd)
*Zulkifflee bin Hj Hassan & satu yang lain lwn Pendakwa Raya* [1991] 1 MLJ 240 (refd)

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**Legislation referred to**

Common Gaming Houses Act 1952 s 4A(a)
Evidence Act 1950 s 114(g)

*Awang Armadajaya bin Awang Mahmud* (Deputy Public Prosecutor) for the appellant. E

The respondent in person.

**Tee Ah Sing J**: This is an appeal by the Public Prosecutor against the decision of the learned magistrate made on 25 November 1997 whereby the respondent who was charged under s 4A(a) of the Common Gaming Houses Act 1953 ('the Act') was acquitted and discharged at the close of the prosecution case. F

The charge was as follows:

> That you, on 28 January 1993, at about 3.00 pm at No 16, First Floor, New Ruby Studio, Jln Lama, Sibu, in the State of Sarawak, did assist in carrying on a public lottery, to wit, illegal 4-D lottery and that you thereby committed an offence punishable under s 4A(a) Common Gaming Houses Act 1953 (Act 289). G

In respect of ground 3.1, the learned deputy public prosecutor ('the DPP') submitted that, from the evidence of PW1 and PW2, the prosecution has proved that exhs P2A to G were found in the possession of the respondent. H

In respect of ground 3.2, the DPP stated that the exhibits were seized on the person of the respondent and not in any way related or connected to Tiong Tiang Hoe. He submitted that the presence or absence of Tiong Tiang Hoe can never change the evidence before the court. On the issue of the trousers not tendered, the DPP submitted that it is not fatal to the prosecution because the trousers was not elsewhere but on the person of the respondent himself. I

A In respect of ground 3.3, the DPP submitted that the learned magistrate quoted a few cases when invoking s 114(g) of the Evidence Act 1950. The case of *PP v Por Chong Beng* [1996] 4 MLJ 467 deals with trafficking in 18.15 gms of heroin. Heroin would change in colour after a period of time and, being a fact in issue, it is crucial that the prosecution prove that the exhibits produced in court is the same one seized from the B accused. The slightest change would undoubtedly alter the whole scenario of the prosecution's case.

In our instant case, the trousers allegedly worn by the respondent and the presence or otherwise of Tiong Tiang Hoe is not the fact in issue. He urge the court to distinguish the case cited.

C The case of *Zulkifflee bin Hj Hassan & satu yang lain lwn Pendakwa Raya* [1991] 1 MLJ 240 is also distinguishable from our case. In that case, documents relating to the issue are relevant facts and failure to tender those documents would leave a break in the chain of evidence. He also submitted that the cases of *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 and *PP v Chee Kon Fatt* [1991] 3 CLJ 2564 are distinguishable from the facts of D our present case.

In respect of ground 3.4, the DPP submitted that PW3, the gaming expert has taken great pains in explaining each individual piece of paper P2A to G and explaining the modus operation of illegal 4-D. The gaming expert's evidence must be read in its totality and the gaming expert in E explaining his findings explained his reasons at p 17 of the appeal record. This is in compliance with the case of *Wong Wiew Hock v PP* [1997] 3 CLJ 255.

The failure of appreciating the expert evidence in its totality by the learned magistrate is a serious error in law and occasioned a miscarriage of F justice.

The respondent did not make any submission.

I shall first deal with ground 3.1 of the appeal.

ASP Tan Boon Sing ('PW1') has testified at p 8 of the appeal record:

> G Later, I conducted a body search on him. Inside the left pocket of the trousers, I found and seized seven pieces of paper written with numbers and, from his purse, I seized RM590. Later, I seized the exhibits and make a search list and the search list has been signed by him.

Cpl Lee Meng Hee ('PW2') (at pp 11 and 12 of the appeal record) testified that on 28 January 1993 at 2.40 pm, he together with PW1, Chief Inspector H Peter Umbuas, DLC Perumal and L/Cpl Zulkipli, conducted a raid at No 16, First Floor, Old Lane Road, Sibu. An old man known as Tiong Tiang Hoe was in the shop. During the examination, the respondent entered the shop. PW1 seized seven pieces of paper written with numbers from the left pocket of the respondent's trousers and seized RM590 from the wallet of the respondent.

I I am of the view that from the evidence of PW1 and PW2, the prosecution has proved that P2A to G were recovered from the left trousers pocket worn by the respondent. As such, the prosecution has proved that

P2A to G were found in the possession of the respondent. Thus, the learned magistrate erred in law and in fact when in his grounds of decision at p 27 of the appeal record, he said:

> Having the opportunity to peruse the evidence put forward by the prosecution, I found that the prosecution has failed to prove the element of possession.

I shall next deal with grounds 3.2 and 3.3 together.

The evidence adduced clearly showed that P2A to G were recovered from the left trousers pocket worn by the respondent. There was no evidence adduced through cross-examination that the respondent did not wear the trousers at the time of the seizure of the exhibit. It was not even put in cross-examination that the trousers was, for example, recovered from a cupboard.

I agree with the contention of the learned DPP that the failure to tender the trousers is not fatal to the prosecution's case.

Similarly, the failure to call or offer Tiong Tiang Hoe to the defence is not fatal to the prosecution's case. It will be different if there were discrepancies in the evidence of PW1 and PW2 as to where P2A to G were recovered, in which case, the failure to call or offer Tiong Tiang Hoe would invoke an adverse inference against the prosecution under s 114(g) of the Evidence Act 1950.

Lastly, I shall consider ground 3.4 of the appeal.

PW3 has testified that E1 recorded 129 illegal 4-D tickets with the total stakes of RM699. PW3 has not explained how he came to the conclusion that exhibit marked E1 (P2A) was recorded with 129 illegal 4-D tickets with total stakes of RM699. For example, in the first column first line, there is the figure '5576.62'. He has not explained what the figure means. He has not explained in the figure '5576.62' what is the number staked and what is the amount.

PW3 has said there is a code of 'x' commonly used for illegal 4-D. X represents bets of 50 cents. He has not pointed out to the court what are the figures in P2A that have the code 'x'. PW3 has said there is a 'circle' code number of Chinese characters mean permutation bets. Circle with Chinese character of 'Tao' meaning only first number will not be permutated. There is a 'circle' code with character of 'wes' meaning the last number will be permutated. PW3 has not explained in P2A which of the figures contain circle codes number of Chinese character. PW3 has also not explained in P2A which of the figures contain Chinese character of 'Tao' and 'wes'. PW3 merely said, '... circle with Chinese character of "Tao" meaning only first number will not be permutated ...'. PW3 should have stated what were the numbers staked based on 'Tao'. PW3 has not given any reasons for his opinion.

From the testimony of PW3, it is clear that PW3's evidence as a gaming expert was wanting. He has not given any reason or explanation for his opinion. The expert evidence was not adequate to enable the court to form an independent judgment that P2A to G were relating to illegal 4-digit lottery.

A As such, the prosecution has not proved beyond reasonable doubt that P2A to G were lottery tickets and/or that they were documents of 'any account, memorandum, riddle or record of stakes or wagers in or relating to a lottery.'

Thus, the learned magistrate did not err when he acquitted and B discharged the respondent without calling for his defence.

In view of the foregoing, the appeal is dismissed.

*Appeal dismissed.*

Reported by Chin En Tek

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